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Nos. 372, 373.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1928.

THE CITY OF CINCINNATI, Petitioner,

vs.

MARGARET W. VESTER.

THE CITY OF CINCINNATI, Petitioner,

vs.

JAMES S. RICHARDS, *et al.*

(On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit, to Review Its Decision Reported at 23 Fed. 2nd 242.)

Motion of the People of the State of New York for Leave to File Brief as Amicus Curiae, and Brief of Amicus Curiae.

HAMILTON WARD,
Attorney General of the State of New York.

HENRY S. MANLEY,
Assistant Attorney General.

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MARGARET W. VESTER (No. 372; also vs. RICHARDS, No. 373).

Motion for Leave to File Brief as Amicus Curiae.

May it please the Court:

The undersigned, as counsel for the People of the State of New York, respectfully moves this Honorable Court for leave to file the accompanying brief in these cases as *amicus curiæ*.

HAMILTON WARD,
Attorney General of the State of New York,

HENRY S. MANLEY,
Assistant Attorney General,
Counsel for the State, as Amicus Curiæ.

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THE CITY OF CINCINNATI, Petitioner,

vs.

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BRIEF ON BEHALF OF THE PEOPLE OF THE STATE OF NEW YORK, AMICUS CURIAE.

Preliminary Statement.

OPINION BELOW.

The opinion of the District Court (R. 26-33) is not reported, so far as we know. The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. 103-108) is reported in 33 F. (2nd) 242. Certiorari was granted by this court on October 21, 1929.

INTEREST OF THE STATE.

The courts below have held that "excess condemnation," as involved in these cases under the supposed authority of the Constitution of Ohio, is a taking of property without due process in violation of the 14th amendment to

the Federal Constitution. The Constitution of the State of New York contains a provision intended to authorize such acts of "excess condemnation" as are involved in the Vester and Richards cases, at least. Because of these facts, the State of New York deems itself interested in establishing that the opinions below are erroneous.

Constitution of Ohio, Art. XVIII, Sec. 10.

"*Appropriation in Excess of Public Use.* A municipality appropriating or otherwise acquiring property for public use may in furtherance of such public use appropriate or acquire an excess over that actually to be occupied by the improvement, and may sell such excess with such restrictions as shall be appropriate to preserve the improvement made. Bonds may be issued to supply the funds in whole or in part to pay for the excess property so appropriated or otherwise acquired, but said bonds shall be a lien only against the property so acquired for the improvement and excess, and they shall not be a liability of the municipality nor be included in any limitation of the bonded indebtedness of such municipality prescribed by law."

Constitution of New York, Art. I, Sec. 7, 2nd Par.

"The Legislature may authorize cities and counties to take more land and property than is needed for actual construction in the laying out, widening, extending or relocating parks, public places, highways or streets; provided, however, that the additional land and property so authorized to be taken shall be no more than sufficient to form suitable building sites abutting on such park, public place, highway or street. After so much of the land and property has been appropriated for such park, public place, highway or street as is needed therefor, the remainder may be sold or leased."

Facts.

In 1927 the City of Cincinnati took certain steps towards the widening of Fifth Street, between Main Street

and Pike Street. This section is near the heart of the city, and Fifth Street at this part carries a large amount of eastbound traffic. The streeet was then 66 feet wide, and it was proposed to add 25 feet on the south side of the street for the six blocks in question (R. 84, par. 4). There is no question as to the power of the city to take that 25-foot strip.

Incidentally to that street widening, the City attempted the three excess condemnations now in question, together with others which apparently have not been challenged. The facts as to each of these three appear to be as follows:

RICHARDS PROPERTY.

On the south side of Fifth Street, in the three blocks in which the challenged excess condemnations arise, the buildings are mostly old, and the individual frontages small (R. 19, 84, par. 6). In the block in which the Richards property is found, Fifth Street is paralleled at a distance of 100 feet from its south line by Buchanan Street. After taking the 25-foot strip there will be left a block about 300 feet long composed of narrow individual properties only 75 feet deep. The Richards property is one of those, 23 feet wide, running through from Fifth Street to Buchanan Street (R. 40, 44, 87). On the Richards property is an apartment house, age unknown, containing five apartments renting for a total of $176 per month (R. 14). The value of the property is $28,000 or more, the 25-foot strip to be taken is worth $15,000 or more, and the remnant will be worth, "in excess of its present value," apparently meaning in excess of $13,000 (R. 18, 20, 24). The answer says this house is two stories, "very old," and built to the street property line, so that taking the front 25 feet

will destroy the entire building (R. 47). The answer also asserts that the 23 by 75 lot left after the street widening, "will be incapable of suitable development by itself to produce reasonable income on its market value" (R. 47), and there is some testimony that the street widening would naturally result in aggregating of parcels (R. 20), which supports the assertion of the answer. The properties on either side of the Richards property for the entire block are being subjected to excess condemnation, making up the strip 75 feet deep and about 300 feet long, bounded on the west by Lawrence St., north by the widened Fifth St., east by Pike St., and south by Buchanan St.

VESTER PROPERTY.

The excess condemnation which includes the Vester property takes in about 75 feet in depth from the widened Fifth Street, making a slight jog in order to follow the lot lines at the rear. It takes in the frontage on Fifth Street of a complete block, but only 170.46 feet long. Apparently it includes remnants of three small lots, besides the Vester lot and an identical lot immediately south from it (R. 87). The Vester lot has 27 feet frontage on the east side of Broadway, and runs back 90 feet parallel with Fifth Street, only 19 feet south of the proposed south line of Fifth Street (R. 1, 9). On the Vester property is a three-story building apparently fifty or sixty years old (R. 18). It is a residence building, and the lower floor is occupied by a physician's office (R. 12). The answer says that after the widening of Fifth Street the 19-foot strip north of the Vester property, "will be incapable of development by itself as a suitable lot for the erection of a building worthy of the corner it will occupy," and that the Vester building, even before the widening, is "incapable of producing a reason-

able income on its present market value" (R. 9). There appears to be no direct evidence supporting these allegations, but indirectly they are supported by the testimony as to location, size, present value of $46,600 or more for the Vester property (R. 18), and probable aggregating of parcels (R. 20).

REAKIRT PROPERTY.

The Reakirt property is rectangular, with a frontage of 138.81 feet on Fifth Street and 149.67 feet on Sycamore Street. It is worth upwards of $500,000, perhaps much more than that (R. 19, 24, 75). It is unimproved except by a filling station, apparently regarded as a "taxpayer" rather than a permanent structure (R. 15). In 1925, after the widening of Fifth Street was anticipated, but apparently without any anticipation of excess condemnation, the property was leased for 99 years, the lessee being obligated to build a commercial building not less than three stories in height and costing not less than $250,000 (R. 77). It is proposed to take the whole by excess condemnation; also an equal depth for the remainder of the block, which extends about 100 feet west from the Reakirt property. This block is taken to a depth of about 125 feet in excess of the proposed widening, whereas the other blocks affected east and west from it are taken to a depth of only about 75 feet. There is no allegation in the answer that the Reakirt property, or any adjoining property, will be so small after the street widening as to be incapable of suitable development to produce reasonable income on its market value, or in accordance with the character of the neighborhood. On the contrary, there is an express admission in the answer that the Reakirt property is, "available for the building of a high-class office building" (R. 62). See also testimony to similar effect (R. 15-16) and the lease (R. 74-80).

PURPOSE OF EXCESS CONDEMNATION.

The bills of complaint assert that each of the proposed excess condemnations is:

> "* * * a mere speculation upon an anticipated increase in the value of the properties adjacent to said improvement when made, and said property is taken for the purpose and with the design of reselling the same at a profit to private individuals to be used for private purposes, and no use of said property by or for the public is intended or contemplated." (R. 3, 41, 57.)

This allegation is denied in each answer (R. 7, 45, 62) and the purpose of the excess condemnation is alleged by the city in various terms, which appear to be accurately summed up by the concluding allegation of each answer, as follows:

> "In conclusion the City of Cincinnati expects two things in connection with the application of the principle of excess condemnation to plaintiff's property and to other property along the south side of Fifth street from Main street to Pike street, to wit:
>
> 1st. That the city will be able to further the appropriate development of the south side of Fifth street, between Main and Pike streets by using or disposing of its excess in tracts of such size and with such restrictions as will inure to the public advantage.
>
> 2nd. That the increase in value of plaintiff's property and other properties which may accrue by reason of the improvement contemplated by the city will pay in part the very heavy expense to which the city will be put in effectuating the improvement." (R. 10, 48, 64-65.)

The Resolution of the City Council of July 6, 1927, commences:

"Declaring the intention to appropriate property for street-widening purposes and in furtherance of said purpose to appropriate property in excess of that actually to be occupied by said improvement." (R. 85.) It concludes:

"That [the] Council hereby declares that the appropriation of said excess property described in Section 2 hereof is in furtherance of the said widening of Fifth Street as described in Section 1 hereof, and is necessary for the complete enjoyment and preservation of said public use." (R. 87.)

The Ordinance of March 21, 1928, commences with a recital similar to that quoted first above, and in introducing a description of the lands subjected to excess condemnation, says:

"That, in pursuance of the public use set forth in Section 1 hereof [street widening] and for a more complete enjoyment and preservation of the benefits to accrue from said public use, the following described property be, and the same hereby is, appropriated in excess of the property described in Section 1 hereof:" (R. 89-90.)

Nothing further appears as to the purpose or motive of excess condemnation, except that each answer says the city is operating under the Constitution of Ohio, Art. XVIII, Sec. 10 (R. 9, 47, 63).

SUMMARY OF ARGUMENT.

Point I. Excess condemnation upon the remnant theory is an outgrowth of actual experience.

" II. Taking unusable remnants, and no more, is not an appropriate remedy. Taking unusable remnants, plus enough more to make them usable, is the appropriate course.

" III. The requirement of due process does not forbid taking unusable remnants plus enough more to make them usable.

" IV. The Richards and Vester cases represent appropriate applications of excess condemnation upon the remnant theory. The decisions below in those cases should be reversed.

POINT I.

Excess condemnation upon the remnant theory is an outgrowth of actual experience.

"The life of the law has not been logic; it has been experience." We have to determine whether certain uses of excess condemnation have such a relation to public welfare as affords them social justification. We are directly concerned with, "the felt necessities of the time," which, "have had a good deal more to do than the syllogism in determining the rules by which men should be governed." "Upon this point a page of history is worth a volume of logic."*

To evaluate the force of experience behind the principle of excess condemnation, it is necessary to examine its history in some completeness. That history is to be found in statutes, decisions, and texts. We believe the importance of the question justifies the method, and the bulk, of the matter separately bound as an Appendix to this brief.

Reviewing the past, which alone gives to the few words

* The quotations are, of course, from O. W. Holmes, Jr., "The Common Law", page 1; also from Mr. Justice Holmes, in New York Trust Co. v. Eisner, 256 U. S. 345, 349.

of constitution and statute their meaning and significance, we note that before 1900 there was some legislative fumbling with the problems related to excess condemnation. Those statutes were various in terms, isolated, and relatively insignificant. Some court decisions of that period denied the constitutionality of excess condemnation, even for taking the smallest remnant.*

Only since 1900, and especially since the Massachusetts report of 1904, has there been a significant and general turning to excess condemnation. Too forceful to be discouraged by a Massachusetts advisory opinion in 1910 that nothing could be taken except unusable remnants, and by other adverse decisions in Maryland in 1911, in Pennsylvania in 1913, and in Virginia in 1921, the principle has established itself in the constitutions of eight states. This chronology may be indicated as follows:

1904 Massachusetts report, and statute (App. 3-4, 24-29). Ohio statute (App. 6-7).

1905 Philippine Island statute (App. 8).

1906 Maryland and Virginia statutes (App. 9, 11).

1907 Connecticut statute (App. 10).

1908 Maryland statute (App. 9).

1909 Wisconsin statutes (App. 15). Proposed broad constitutional amendment in N. Y. failed of passage (App. 20-21).

1910 Maryland statute (App. 9.) Massachusetts advisory opinion against excess condemnation (App. 5-6).

1911 Massachusetts constitution amended (App. 6. Various statutes under that authority, 1912 to 1928, are listed in a footnote). Wisconsin statute (App. 15-16). Proposed broad amendment defeated by pop-

* An Appendix to the Brief, etc., pages 1-3. Hereinafter references to the appendix will read merely "App.", followed by the page number.

ular vote in New York (App. 21). Maryland adverse decision (App. 9-10).

1912 Ohio and Wisconsin constitutions amended (App. 7, 16). Articles by Warren, Munro, Binkerd; resolution of N. Y. Mayors (App. 30, 33, 35-36).

1913 New York constitution amended (App. 21. Various statutes under that authority, 1915-1929, footnote App. 22). Oregon statute (App. 15). Pennsylvania adverse decision (App. 13-14). Report to Mayor N. Y. City (App. 36-37).

1915 Pennsylvania constitutional amendment passed but never submitted (App. 14-15). Article by Williams; report by Swan (App. 38-42).

1916 Rhode Island constitution amended (App. 17). Article by Swan; texts by Shurtleff and Robinson (App. 42-43).

1917 Text by Cushman (App. 43-44).

1918 Pamphlet by Chicago Bureau of Public Efficiency (App. 45). Review in 1919 by Swan (App. 45-46).

1920 Illinois constitutional amendments proposed (App. 18).

1921 Oregon statute amended (App. 15). Virginia adverse decision (App. 12).

1923 Pamphlet by Purdy (App. 46).

1925 Article by Williams and others (App. 46-47).

1927 New York constitutional amendment extended to counties (App. 21). Illinois statute relative to Chicago (App. 18).

1928 Michigan, California and Virginia constitutions amended (App. 19-20, 12).

1929 Adverse decision in federal court relative to Ohio constitution (App. 7-8). Constitutional question presented in two New York litigations (App. 22-23).

POINT II.

Taking unusable remnants, and no more, is not an appropriate remedy. Taking unusable remnants, plus enough more to make them usable, is the appropriate course.

The experience set forth in the literature of excess condemnation, with many concrete illustrations,* shows that following the widening of a street, or any similar public improvement, particularly in the business section of a city, the "equilibrium" of lots is adversely disturbed. The passage of years has tended to fix their size and shape to that most efficient under the particular conditions. All this is injuriously affected by the change in property lines.

Under the ordinary policy of *laissez faire*, it frequently will happen that years will pass after the improvement before the interests of the remnant owner and the rear or adjoining owner will be brought into harmony and their properties united. Until that event, the property will be unsightly and unprofitable.

This is not bare theory, but the dear teaching of experience. This was a fact attested before the legislature of New York State, by maps and photographs, when it approved the constitutional amendment of 1913 (App. 48 and following). Herbert S. Swan referred to visible illustrations of his point, in New York, Philadelphia and Chicago, before he summed up one aspect of the public interest, in his question:

> "Were it not better that the erstwhile village streets should choke with metropolitan traffic than that the appearance of the city should be forever marred

* App. 24-27, 34, 35-37, 39, 40, 45, 46, 47; also the maps and photographs.

and ruined as a result of improvements executed without regard to the replottage of contiguous and neighboring land?" (App. 46.)

Merely taking the remnant does not touch the real problem. Nothing effective is accomplished by holding remnants by the city in "innocuous desuetude." And if they be sold, at public auction, the city will ordinarily gain in immediate money, but in nothing else. Baltimore tried that experiment; the power to sell remnants, under the Burnt District law:

> "* * * was used in at least one case and a remnant almost unusable alone was bought by a speculator at public auction and used in a manner calculated to extort blackmail from the owner next in the rear."*

Massachusetts became conscious of that defect in its Remnant Act of 1904, according to Mr. Swan:

> "As the power to take remnants without the power to take sufficient land to form suitable building lots would have been of small use in planning improvements, the statute was never utilized."*

We are aware that the Massachusetts advisory opinion *(Opinion of Justices,* 204 Mass. 607, also 616; App. 5-6) squarely holds that unusable remnants may be taken, but no more.

That opinion is a suicide. The power denied destroys the power conceded. Not only does it destroy its effectiveness in practice, but also its basis of reason, because the power to take what is needed to make remnants useful is a logical implication from the only principles which justify taking remnants at all.

The public purpose is to lay out a street. Any incident must be justified by some appropriate relation to that

* Flavel Shurtleff, "Carrying out the City Plan" (1916) page 118, note.
* "Excess Condemnation" (1915) page 57.

purpose. The purpose is aided upon the financial side, only, if the taking be restricted to unusable remnants.

The Massachusetts court seems to have been troubled by that fact, while not clearly confessing it. The court said:

> "We can conceive of a remnant of an estate, a part of which is necessarily taken, which remnant is so small, or of such shape, and of so little value that the taking of it in the interest of economy or utility, or in some other public interest, may be fairly incidental and reasonably necessary, in connection with the taking of land for the public work." (204 Mass. 620; App. 6.)

The court may have felt that a concession as to the unusable remnant was forced upon it by *Dorgan v. City of Boston* (94 Mass. 223; App. 3), and by six years sufferance of the Remnant Act. For whatever reason, it said that unusable remnants might be taken, and referred to *"economy," "utility," "or some other public interest."*

The first reference is easy to understand; but why the principle of "economy" can justify the taking of an unneeded and unusable remnant, and must stop short there, rests upon the *ipse dixit* of the court. How "utility" is served by taking the unusable remnant, and cannot be served by joining enough with it to make it usable, is far from clear. And then, least clear of all, that mysterious reference to "some other public interest." Can this be a hint at municipal æsthetics? The reference was either completely meaningless, or else too full of meaning to fit the limits of the occasion.

In our view, the taking of the unusable remnants, plus enough more to make them usable, is readily justifiable,

if we first accept it as an experienced fact that the free processes of trade will not accomplish that end.

The end is an appropriate object of governmental activity. The sovereign may open a street, and should do it in an efficient and economical manner, remembering that streets serve the public use in other ways than bearing through traffic, and that public health and convenience and civic beauty are, at least since 1903*, as appropriate matters of public concern as direct utility. The laying out of streets is an appropriate exercise of state sovereignty, just as certain fiscal operations are an appropriate exercise of national sovereignty; the choice of means to be employed involves a broad legislative discretion. *McCullough v. Maryland*, 4 Wheaton 316.

That there must be limitations upon the legislative discretion, and the scope of the argument for it, is conceded. It is the policy of our society to protect individual rights, and merge them no more than necessary in the rights of government. But our argument now goes no further than that the government should be permitted to act in a matter very nearly related to conceded functions of government, and where individualism is helpless.

We submit that the same public use or interest which justifies the taking of unusable remnants, with stronger reason justifies the taking with them of adjoining land, making in all, *"no more than sufficient to form suitable building sites abutting on such street."* (Quotation from N. Y. Constitution, *ante*, page 3.)

* Williams v. Parker, 188 U. S. 491; Cusack Co. v. Chicago, 242 U. S. 526; Rindge Co. v. Los Angeles, 262 U. S. 700; Euclid v. Ambler R. Co., 272 U. S. 365.

POINT III.

The requirement of due process does not forbid taking unusable remnants plus enough more to make them usable.

The older state decisions, holding that not even unusable remnants can be condemned,* may be disregarded. Nobody believes them to be law today.

The Pennsylvania and Virginia decisions *(Penna. Mutl. Life Ins. Co. v. Phila.,* 242 Pa. 47; *Richmond v. Carneal,* 129 Va. 338) may rest upon their peculiar facts, unrelated to any justification for excess condemnation (See App. 12-14).

The Massachusetts decision which we have already discussed, and the decisions below in the present case, rest upon a lack of understanding and sympathy with the remnant motive for excess condemnation.

The constitutions of eight states now declare that excess condemnation is or may be a taking for a public purpose. This is a judicial question, but we believe this court is free to accept the declaration as a correct statement of fact. It has usually accepted such declarations:

Williams v. Parker, 188 U. S. 491.
Clark v. Nash, 198 U. S. 361.
Strickly v. Highland Bay, 200 U. S. 527.
Jones v. Portland, 245 U. S. 217.
Green v. Frazier, 253 U. S. 233.
Joslin Co. v. Providence, 262 U. S. 668.
Milheim v. Moffatt Tunnel, 262 U. S. 710.

* Dunn v. Charleston, Harper's Rep. 189; Matter of Albany St., 11 Wend. 149; Embury v. Connor, 3 N. Y. 511; Bennett v. Boyle, 40 Barbour 551; Bond v. Mayor, etc., 116 Md. 683.

We anticipate that this court will concede to the states the same latitude of method it concedes to the federal government. That will be ample for present purposes.

Brown v. United States, 263 U. S. 78.
Old Dominion Land Co. v. U. S., 269 U. S. 55.
Highland v. Russell Car Co., 279 U. S. 253.

POINT IV.

The Richards and Vester cases represent appropriate applications of excess condemnation upon the remnant theory. The decisions below in those cases should be reversed.

The Richards case involves a remnant, 75 feet deep and 23 wide, running through from street to street. Probably the state of pleadings and record justify accepting the allegation of the answer that the remnant, "will be incapable of suitable development by itself to produce reasonable income on its market value," and hence that aggregation of parcels must precede any erection of permanent improvements. The properties on either side are being taken with it, and will be available for aggregation by act of the city.

The Vester case differs from the other, only in that the Vester property is not itself a remnant, but is needed for aggregation with a remnant. Like the Richards property, the Vester property has its obvious future in aggregation, and owes its value to that possibility, if we may rely upon the answer (Compare, R. 9-10, and 20).

We do not find anything in the record, or in "common knowledge," which justifies the following statements of the Circuit Court:

> "The remnants theory, as technically considered, is not applicable to the property here involved. * * * What is left of the Richards property, three-fourths, would be valuable and utilizable for purposes suitable to the location of the property." (R. 105-106.)

Nor do we know of anything which justifies its similar statement, including the Vester property, that, "there will be enough left to meet the needs of suitable buildings for that vicinity." (R. 106.)

Assuming that the excess condemnations involved in the Richards and Vester cases are within the intent of the Ohio constitutional provision (an assumption which seems proper, notwithstanding some slight doubt whether it ever intends a sale without restrictions, or an excess condemnation upon any but the restrictive motive) they should be sustained.

It is respectfully submitted that the decisions below in those two cases should be reversed.

HAMILTON WARD,
Attorney General of the State of New York,
Amicus Curiæ.

Brief by:
HENRY S. MANLEY,
Assistant Attorney General.
Albany, March 3, 1930.